

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN POSEY,

Defendant-Appellant.

UNPUBLISHED

July 23, 1999

No. 198858

Recorder's Court

LC No. 96-000936

ON REMAND

Before: Holbrook, P.J., and Doctoroff and Cavanagh, JJ.

MEMORANDUM.

The Supreme Court remanded this case for reconsideration after this Court reversed defendant's conviction for second degree murder and felony firearm, based on erroneous jury instructions on the lesser included offense of voluntary manslaughter. We affirm defendant's convictions.

In the initial opinion, this Court observed that there was evidence to support a voluntary manslaughter conviction based on a theory of imperfect self-defense. The Supreme Court noted that this defense had not been raised by defendant at trial, and remanded for consideration whether defendant was entitled to a voluntary manslaughter instruction on any other basis. Review of the record shows that the evidence did not support the requested instruction.

Manslaughter is a cognate lesser included offense of murder, and if the evidence supported the instruction on that offense, the trial court was required to give the instruction. *People v Sullivan*, 231 Mich App 510, 517; 587 NW2d 578 (1998). The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. The element of provocation distinguishes the offense of manslaughter from murder. *Id* at 518.

There was no adequate provocation presented which would support a voluntary manslaughter instruction in this case. The victim may have started the confrontation, but defendant's companion escalated the confrontation by pointing a gun at the victim. Defendant failed to object to the instructions given by the trial court. Where the requested instruction was not supported by the evidence, the court's

failure to give the instruction does not constitute manifest injustice. *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh